IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.5520 OF 2004

Wasanti Amol @ Avikumar Dhule ...Applicant

Versus

Janakalyan Co-operative Path

Sanstha Ltd. & Anr. ...Respondents

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Mr.Tejesh Dande for Applicant.

Mrs.Anjali N.Helekar for Respondent No.1.

Mr.K.V.Saste, A.P.P. for Respondent No.2.

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CORAM: A.M.KHANWILKAR, J.

APRIL 25, 2005.

P.C.

1. Heard Counsel for the parties.

2. This Application is filed for transfer of case pending before the Court of Judicial Magistrate, First Class, Mahad, District Raigad being Summons Case No.240 of 2004, to any other Judicial Magistrate, First Class in the region for

further trial and disposal as per law.

3. This Application has been moved on the allegation that the Applicant entertains reasonable apprehension that she will not get justice at the hands of concerned Trial Judge before whom aforesaid criminal case is pending for trial against the Applicant. The basis on which such apprehension is entertained, is essentially that although, the Applicant had intention to compromise the matter and had filed formal application in that behalf, and the Respondent, in turn, had also agreed for compromise, the Trial Judge rejected the said Application and proceeded with the trial.

4. It is then asserted that the Applicant was throughout present on all dates, except on 8th October 2004 and 11th October 2004. The Trial Judge, however, straightway proceeded to issue non-bailable warrants against the Applicant, which was made returnable on 5th November 2004. Before that date, the Applicant moved the Trial Judge on 4th November 2004 for recalling/cancelling the non-bailable warrants issued against her. When the

Applicant appeared in-person along with her Advocate before the Trial Judge on 4th November 2005, instead of granting her application, the Trial Judge proceeded to direct that the Applicant be taken into custody. Soon thereafter, the Applicant moved three applications, including application for bail, which were rejected and as a consequence of which, the Applicant remained in custody for about three days, to be eventually released on 6th November 2004.

5. At the first blush, the argument of the Applicant seems to be attractive. However, on closer examination of the documents on record, it is more than clear that the grounds on which, the Applicant has moved this Court, are non-existing grounds. Rather, pressed into service to create a facade so as to justify the apprehension.

6. I shall first deal with the grievance regarding attempt of Applicant to compromise the matter. Indeed, formal application (Exhibit 13) was filed by the Applicant on 8th September 2004. The Application records that the Applicant was

willing to pay Rs.10,000/- (Rupees Ten Thousand) to the Respondent. The reply filed by the Respondent on that Application, does record that Respondent has no objection for granting 15 days time. Accordingly, the Trial Court granted adjournment as prayed for. However, the crucial aspect that the Respondent had agreed for settlement of the total amount, which is over Rs.1,98,000/- (Rupees One Lakh Ninety-eight Thousand), is not at all adverted to by the Applicant. Moreover, the order dated September 28, 2004 passed by the Trial Court is not on (Exhibit 13) as was projected, but it is seen from the record now produced during the course of argument that the said order was passed on Application Exhibit 14. However, the said Application (Exhibit 14) has not been filed along with the Application. When insisted, the zerox copy of the certified copy of the said document Exhibit 14 was produced by the Applicant for the perusal of the Court. That application was filed by the Applicant for permission to deposit amount of Rs.10,000/- (Rupees Ten Thousand) in Court and for grant of further time for settlement, as matter was being deliberated between the parties. This

Application, however, was objected to, by the Respondent by recording the fact that on the earlier occasion i.e. previous date (8th September 2004), the Applicant had agreed to pay entire outstanding amount over Rs.1,98,000/- (Rupees One Lakh Ninety-eight Thousand). Whereas, now, the Applicant was resiling from that position. Accordingly, the Respondent objected to the prayer made by the Applicant. It is in that backdrop, the Court rejected the Application Exhibit 14, as can be seen from Roznama of 28th September 2004. The Court then proceeded to close the prosecution evidence and posted the matter on 8th October 2004 for recording of Accused statement.

7. In other words, it is not as if the Court, on its own, rejected the attempt of the Applicant to compromise the matter, but Application Exhibit 14 was rejected, as the same was objected to by the Respondent on valid grounds, as can be seen from the noting on Exhibit 14 made by the Counsel for the Respondent as well as the order passed thereon. Copy of this Application was not filed along with this Application, which is a material document. On

this count alone, the Application deserves to be dismissed. For, the Applicant has not approached this Court with clean hands.

8. Suffice it to observe that the argument that although the Applicant was inclined to settle the matter, the Court rejected the application for compromise, is a non-existing, much less, false and misleading ground; and if such ground is pressed into service, by no standards, it can be said that it is reasonable apprehension.

9. The next ground for entertaining the apprehension is that instead of cancelling the non-bailable warrants issued by the Trial Judge for non-appearance of the Applicant on 8th October 2004 and 11th October 2004, the Trial Judge directed the Applicant to be taken into custody forthwith. However, the background in which the order dated November 4, 2004 came to be passed, needs to be adverted to. The Applicant preferred formal application before the Trial Judge for cancelling the non-bailable warrants. It is stated in the Application that she was unwell, on account of

which, she was not able to attend the Court on relevant dates. This Application was resisted by the Respondent. The Court, after considering the objection, proceeded to observe that the Applicant had jumped bail and was prolonging the further hearing of the case. Indeed, the Applicant moved second Application before the Trial Judge after the order was passed by the Trial Judge on 4th November 2004 for sending her to Magisterial custody. The Applicant asserted that the Applicant was suffering from severe stomach pain because she was inflicted by Appendix. It is thereafter, asserted that if she is taken into custody, there will be no one to take care of her young child, who is at home. It was prayed in this Application to cancel the order directing Applicant to be taken into custody. This Application was resisted by the Respondent on the ground that no reliable evidence has been produced by the Applicant to substantiate her claim that she was unwell and suffering from Appendix. The Respondent also asserted that the Applicant was staying hardly 1000 (One Thousand) feet away from the Court premises, and therefore, the explanation offered is false and ought not to be accepted.

10. The Court below, after considering arguments of both sides, proceeded to pass order on said Application Exhibit 29 which reads thus :

> "Read application say and medical certificate on record. Read earlier order below similar application. At the time of said application the accused did not produced certificate, Viz previously she moved the court and sought examination or inform the court with proof. In the result case of illness seems to fictitious. Moreover if at all she suffering as stated she will be treated by medical officer there. The case is more than six months old and pending on file for statement u/s 313 of Cr.P.C. and it is also observed that she is prolonging the hearing. Hence I do not find substance in application and it stands rejected".

11. After this order was passed, once again, another application came to be filed on behalf of the Applicant Exhibit 30 that the Applicant is willing to furnish surety for the appropriate amount, as may be directed. However, this Application was filed at the fag end of the day when the complainant and litigants had already left the Court premises. That fact has been recorded by the Trial Judge in his order dated 4th November

2004. The background in which the matter was contested by the Respondent, the Court thought it appropriate to place the Application for hearing on 5th November 2004 inviting say of the Respondent. While doing so, the Court has passed speaking order, which reads thus :

> "Read application and orders below ext.28 and 29. This application had come to be moved at the time of closing of day and when complainant and litigants left the court premises. The accused has jumped the previous bail and hence as of right. She can not claim the bail against and unless otherside is heard, the present application will not be considered. In the result keep the application for hearing on 5-11-2004."

12. On 5th November 2004, Application Exhibit 30 preferred by the Applicant was resisted on behalf of the Respondent, asserting that no plausible explanation is forthcoming as to what prevented Applicant to remain present in Court on 8th October 2004 as well as 11th October 2004. It was asserted by the Respondent that the Applicant had intentionally remained absent on the relevant

dates, so as to delay the proceedings. Moreover, no tangible documentary evidence was submitted to support the claim of illness of the Applicant.

13. Once again, the Court, after considering the objections, thought it appropriate to accept the objection taken on behalf of the Respondent and passed the speaking order on 5th November 2004, which reads thus :

> "Read application and say. Read record and & I find substance in the say. As such again and again reaching of accused without assisting the court - to make progress in hearing will not be considered. Rejected."

14. Thereafter, the Trial Judge proceeded with the trial and recorded the statement of the Applicant under Section 313 of the Criminal Procedure Code. After doing so, the Court has ordered that the Applicant be released on bail by passing a speaking order on 6th November 2005, which reads thus:

> "Read application say and record. Heard both side. From record it is seen that

> though accused was complaining about illness, and direction to provide her the medical aid issued to that effect, the medical officer has not submitted any report to the court that really she is ill. So the contention regarding illness will not be said to be well founded. In spite of that I am agree with the submission of Mr.Khatu that since 2 days she is in Jail and she being woman and local inhabitant her enlargement or bail deserves to be considered. hence Application stands allowed. Accused be released on D.G. and S.G. of Rs.30,000/- with S.S. of like amount."

15. In my opinion, the sequence in which the matter progressed before the Trial Judge, the Trial Judge has dealt with the situation firmly on recording of finding that the attempt of the Applicant was to prolong the trial. It needs to be recalled that the case was listed for hearing on 8th September 2004 , when adjournment was sought at the instance of the Applicant for settlement. But on 28th September 2004, as it appears, the Applicant resiled from the earlier offer to pay the entire amount, for which reason, request for further adjournment was opposed by the Respondent and the Court rejected the prayer in (Exhibit 14) and proceeded with the trial. Thereafter, the

Applicant did not appear before the Court on 8th October 2004 and again on 11th October 2004, though her statement under Section 313 was to be recorded. The Court, therefore, issued non-bailable warrant, returnable on 5th November 2004. The Applicant, however, moved the Application for cancellation, only on 4th November 2004. It is seen that the Applicant resides only 1000 (One Thousand) feet away from the Court premises. If it is so, it cannot be said that the apprehension entertained by the Applicant is a reasonable one, especially when the Trial Judge has recorded reasons for passing the order on the relevant dates. If the Applicant was dissatisfied with the order, she could have taken the matter in appeal, if so advised. However, the unscrupulous litigant who wants to prolong the trial for one reason or the other, cannot be heard to say that she has reason to believe that the Judge entertains bias against her. Accepting the request of the Applicant, would result in ordering *de novo* trial, as the case on hand is a summons case. That would be awarding premium on the false and misleading plea taken before this Court for inviting a drastic order of

transfer of a criminal case to some other Judge.

16. Counsel for the Applicant invited my attention to grounds (d) and (e) of the Application. In ground (d) of the Application, it is submitted that the learned Judge was repeatedly insisting the Applicant to settle the case by paying the amount. No fault can be found with that approach of the Trial Judge, if he has suggested the Applicant to settle the matter. In fact, the Applicant's own case is that she was willing to compromise and ready to offer the amount to the Respondent. If it is so, merely because the learned Judge has suggested from the Dias that the matter ought to be settled, that cannot be the basis to attribute bias to the learned Judge or to entertain an apprehension of bias, much less, a reasonable one. On the other hand, in matters under Section 138 of the Negotiable Instruments Act, the Trial Judge is expected to impress upon the parties to find out amicable resolution of the dispute as far as possible, for, the offence is a compoundable offence. It is only when that attempt fails, that the Judge ought to proceed with the

trial of the case.

17. In ground (e), it is submitted that the Trial Judge has expressed from Dias that in his opinion, the Applicant was guilty. There is no such assertion made in the facts narrated by the Applicant. In other words, no foundation has been laid to substantiate the ground couched in Para (e). Indeed, the verification of the Application generally states that averments in Paragraphs 1 to 12 are true to the knowledge of the Applicant, which would cover ground (e) in Para 10. However, as mentioned earlier, the said ground taken in the Application is not supported by proper facts, cannot be the basis to proceed in the matter. The assertion made by the Applicant in this ground, in my opinion, is only an afterthought and a facade raised to maintain the Application before this Court.

18. Taking overall view of the matter, I am not inclined to accede to the request made by the Applicant to transfer the case to some other Magistrate than the Magistrate hearing the case at

Mahad, District Raigad, as the grounds pressed into service do not warrant such a drastic order to be passed. That too, at the instance of the Applicant, who has not approached the Court with clean hands. Accordingly, this Application is dismissed.

19. Issuance of certified copy is expedited.

A.M.KHANWILKAR, J.